No. 01-729

Supreme Court, U.S.
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In The
Supreme Court of the United States

GLENN G. GODFREY AND BRUCE M. BOTELHO,

Petitioners,

v.

JOHN DOE I, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE OFFICE OF THE PUBLIC DEFENDER FOR THE STATE OF NEW JERSEY, THE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY, AND THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does Alaska's sex offender registration act, Alaska Stat. §§ 12.63.010 *et seq.*, which requires convicted sex offenders to register, and pursuant to which the Alaska Department of Public Safety has made information concerning these offenders available to the public on the Internet, impose punishment and, thus, violate the *Ex Post Facto* Clause of the United States Constitution?

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INTEREST OF *AMICI CURIAE*[1]

This case concerns the constitutionality, under the *Ex Post Facto* Clause, U.S. Const. Art. I § 10, of Alaska's registration and community notification law. New Jersey is generally recognized as the birthplace of these types of laws. In October 1994, acting in response to the sexual assault and murder of a seven-year-old girl, Megan Kanka, New Jersey enacted a sex offender registration and community notification law that came to be known as "Megan's Law." Other states, including Alaska, and the federal government followed suit.

In New Jersey, the Office of the Public Defender represents all indigent persons who are entitled to a court hearing concerning the Megan's Law tier classification or community notification proposed for them by the State. Over the course of the last seven years, that Office has represented over one thousand registrants in such proceedings. Likewise, members of the Association of Criminal Defense Lawyers of New Jersey have represented numerous registrants in such proceedings. The American Civil Liberties Union of New Jersey ("ACLU-NJ"), like its parent organization the American Civil Liberties Union, is a non-profit, non-partisan organization whose mission is to maintain and advance civil liberties in the United States. The ACLU-NJ has acted as direct counsel or *amicus* in

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[1] All parties have consented to the appearance of *amici curiae* in this matter, and letters of consent have been lodged with the Clerk. Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that this brief was not authored in any part by counsel for any party. No person or entity other than *amici* and their counsel made a monetary contribution to the preparation and submission of this brief.

many of the constitutional challenges to New Jersey's registration and community notification law, *see, e.g.*, *Doe v. Poritz*, 142 N.J. 1 (1995); *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997), and is currently co-counsel with the Office of the Public Defender in a challenge to New Jersey's Internet Registry Act. *A.A. v. New Jersey*, 176 F. Supp. 2d 274 (D.N.J. 2001).

Amici's extensive contact with the people who are subject to this type of law places them in a unique position to provide this Court with information bearing upon the matters at issue in this case – in particular, the issue of whether registration and community notification laws impose an affirmative disability or restraint.[2] In addition, considering that this Court's ruling could impact the registrants who are represented by *amici*, we have a clear interest in presenting the Court with information and arguments that bear upon our clients' constitutional rights.

SUMMARY OF ARGUMENT

In ruling that Alaska's notification law violates the *Ex Post Facto* Clause, the court of appeals concluded that the effects of that statute "are unquestionably punitive." *Doe v. Otte*, 259 F.3d 979, 993 (9th Cir. 2001). The court reached that conclusion after analyzing the seven factors

[2] *Amici* have lodged with the Court a number of affidavits, newspaper articles, and other materials that shed light on the experiences of the offenders subject to these laws and other issues relevant to this case. The materials lodged under seal are designated as "PD ___"; those not under seal are cited "DOC ___."

identified by this Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

The court of appeals' determination that an analysis of the *Kennedy* factors supports a finding of a punitive effect was correct. With respect to that court's ruling that the statute's requirements imposed "an affirmative disability or restraint," the record developed in New Jersey over the past seven years paints a dramatic picture of the profound and abiding impact of registration and community notification requirements on the offenders who are subject to these laws. Community notification subjects sex offenders (and their families) to physical attack, threats, vandalism and harassment, and even those who manage to escape these consequences likely live in constant fear of them. In some instances, the offender is driven out of town; in less severe cases he is ostracized. Their ability to maintain suitable employment and housing is severely affected. Faced with these harsh consequences, many registrants have stated that they would prefer to be back in prison. Some have resorted to suicide. In short, life under Megan's Law is a sentence to purgatory – an existence in which offenders remain free from incarceration but are denied the ability to lead anything approaching a normal life.

Additionally, although the state legislators who enacted these laws could have rationally assumed that a non-punitive purpose (*i.e.*, public safety) is furthered by them, there is no credible evidence that notification laws actually do improve public safety. The few studies to address this issue have not found significant evidence that community notification reduces sex offender recidivism. Moreover, there is evidence that these laws, by destabilizing

offenders and interfering with their efforts to obtain treatment, *increase* the risk of reoffense.

ARGUMENT

NOTIFICATION LAWS HAVE A SEVERE IMPACT ON SEX OFFENDERS AND THERE IS NO CREDIBLE EVIDENCE THAT THEY IMPROVE PUBLIC SAFETY.

A. A Brief History of Megan's Law.

New Jersey's registration and notification law was a response to the horrific murder of seven-year-old Megan Kanka on July 29, 1994. The day after Megan disappeared, a convicted sex offender who lived across the street – Jesse Timmendequas – confessed to her sexual assault and murder. Timmendequas was convicted of the crime and is currently on death row in New Jersey. *State v. Timmendequas*, 161 N.J. 515, 536-44 (1999).

Public reaction to the murder was intense. Three thousand signatures were presented to the New Jersey Legislature on a petition demanding action, and within two weeks of the crime, bills providing for registration and community notification of sex offenders had been introduced in the New Jersey General Assembly. This legislation was premised on the belief that convicted sex offenders are uncontrollable recidivists, and on the untested assumption that notifying the community of their whereabouts will help to reduce that recidivism. However, these assumptions were given little scrutiny – the legislation passed under emergency suspension of the rules so as to eliminate hearings in the New Jersey Assembly, and all

but the briefest of hearings in the New Jersey Senate. By October 20, a package of bills was approved by the Legislature and Governor Whitman signed them into law on October 31, 1994, just three months after the murder.

Among the new laws was a broad registration and community notification provision, N.J. Stat. Ann. 2C:7-1, *et seq.* ("the New Jersey statute"). The registration aspect of the New Jersey statute requires that "repetitive, compulsive" sex offenders register every ninety days; all other sex offenders must register annually. The extent of community notification for a given registrant depends on their determined risk of reoffense. For high risk ("Tier 3") registrants, notices are distributed to private residences, businesses, schools and community organizations in the area(s) where the offender lives and works. For moderate risk ("Tier 2") registrants, notices are provided to schools and community organizations in those areas. Notification concerning low risk ("Tier 1") offenders is provided only to law enforcement. The New Jersey statute is extremely broad in terms of the offenders who are subject to its requirements. N.J. Stat. Ann. 2C:7-2.

The New Jersey statute has been the subject of a number of constitutional challenges. That litigation resulted in the creation of due process hearings, in which registrants are afforded judicial review of the proposed tier designation and proposed scope of notification, and led to a tailored form of community notification which limited notice to only those likely to encounter the registrant. With these and other requirements in place, the New Jersey statute was upheld. *Doe v. Poritz*, 142 N.J. 1 (1995); *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997).

Consistent with these court decisions, for over seven years notification has been provided by the police to those likely to encounter an offender, based upon geographic proximity. As of March 1, 2001, 5,720 registrants had been classified, with 325 classified in Tier 3, 3,007 classified in Tier 2, and 2,388 classified in Tier 1.

In the year 2000, however, tired of the restraints on notification imposed by the courts, the Legislature and the voters of New Jersey approved an amendment to the State Constitution which purports to remove any state constitutional impediment to any sex offender community notification law to be enacted by the Legislature. N.J. Const. of 1947, Art. IV, § 7, ¶ 12. Accordingly, on July 23, 2001, the Governor signed into law the Internet Registry Act. N.J. Stat. Ann. 2C:7-12, *et seq.* The Act authorizes the creation of a central sex offender registry, available to the public through the Internet "without limitation." N.J. Stat. Ann. 2C:7-13(b). Litigation concerning the constitutionality of the Internet law and the constitutional amendment is currently pending. The sex offender Internet registry became operational on February 21, 2002.

B. Notification Laws Have a Devastating Impact on Sex Offenders and Their Families.

In assessing the specific *Kennedy* factors, most notably "affirmative disability or restraint," it is important to ascertain the real-life impact caused by disclosure of an individual's sex offense history, coupled with identifying information such as his photograph and current home address. For a registrant subject to notification, any hope of redemption, or at least the possibility of leading a somewhat normal life, is illusory. Many registrants are

subject to physical or verbal assaults; others live in a state of constant fear that they too will be attacked. Employers turn them away, fearing that customers will boycott the business if the registrant's history is discovered. Landlords evict them in order to placate the fears of other tenants and neighbors. Through all of this – the classification as a "sex offender" and the resulting, and, indeed, intended, ostracism by the community – the message to the offender is unmistakable: he is a monster, unfit to be treated as an equal member of decent society. The resulting psychological burden is tremendous.

Perhaps the most dramatic cases illustrating the impact of community notification are those in which registrants have been physically assaulted after the community learned of their offense. Consider the following examples:

F.G. F.G. was paroled in 1992 after serving time for a 1975 offense. After his release, he completed an alcohol abuse program, received mental health counseling, and remained offense-free. In 1998, six years after F.G. gained his freedom, notification was distributed to the community. The very same day the notices went out, members of the public began to harass and threaten F.G. Although the notices were distributed only to F.G.'s neighbors, local newspapers were provided with the information and they published stories about F.G.'s presence in the community. A few days later, F.G. received an anonymous letter that read, "We'll be watching you asshole." This message was spelled out using letters cut out from a magazine. Late that same evening, someone fired five shots from a high caliber handgun into F.G.'s home. Several bullets almost hit one of F.G.'s family members. The shooting generated additional publicity and by 4:30 in the afternoon the next

day, a crowd of about 250 people had gathered in front of F.G.'s home. The stress of these events caused F.G. to fear not only for his own safety, but also for the safety and well-being of his family. He checked himself into a hospital and was placed on a suicide watch. F.G. stated that community notification "is a far worse punishment than jail ever was." (PD 1-20.)

M.G. This registrant was released from prison and moved in with an aunt and uncle. About two weeks after his release, notices were distributed. Eleven days later, two men broke into M.G.'s house in the middle of the night. There was a house guest sleeping on the sofa and one of the intruders began to beat this guest, while yelling "Are you the sex offender?" Meanwhile, the other intruder threw a beer bottle through the front window. There were a number of newspaper articles regarding this incident. When M.G. later applied for a job, he was told that because of the publicity, the company would not hire him. (PD 21-25.)

R.R. This registrant was released in 1995 after serving time for a 1986 offense against his stepdaughter. Notices were distributed approximately two weeks after his release. Shortly after the notification was conducted, R.R.'s neighbors started calling him "child molester" when they saw him, and one woman threatened to kill him if he went near her children. R.R.'s landlord told him that the neighbors were complaining about him and he would have to leave. R.R. was later physically assaulted on three separate occasions by people who called him "child molester" or "pervert." On the last of these occasions, three men jumped R.R. from behind and started kicking and punching him, while saying things like, "You like little children,

right!" A number of bystanders witnessed the attack, but no one helped. (PD 89-95.)

C.D. In 1999, this registrant was classified a low risk offender. About a year after that determination was made, a detective from the local police department called and told him that someone was mailing people in the community copies of an old newspaper article about C.D.'s offense. A short time later, C.D. started to experience threats and harassment. People would throw garbage on his lawn, or ring his doorbell late at night and run away. On other occasions, people would drive by C.D.'s home and yell out, "Stop fucking little girls. I'm going to kill you." Then late one evening C.D. heard a knock at his front door. C.D. looked through the door's window and did not see anyone. However, when C.D. then opened the door, a man who had been crouching down in front of the door stood up. The man was wearing a ski mask and carried a handgun. He pointed the gun at C.D. and said, "If you don't get out of this neighborhood I'm going to kill you." The man then turned and fled. (PD 222-25.)

J.H. He was classified a moderate risk offender and notices were distributed to local schools. In August 2001, after the notices were sent out, J.H. went to a party at a neighbor's home. Another guest at the party confronted J.H., yelling: "People like you who are under Megan's Law should be kept in jail. They should never let you out. People like you should die. When you leave tonight, I'm gonna kill you." J.H. left the party but the other guest followed. The guest caught up with J.H. and struck him with a crowbar. J.H. was able to escape, called the police and was taken to the hospital for treatment. (PD 235-37.)

Even those registrants who are not attacked feel the effect of these assaults. The Third Circuit Court of Appeals reviewed the record of these types of incidents in New Jersey and concluded "they happen with sufficient frequency and publicity that registrants justifiably live in fear of them." *E.B.*, 119 F.3d at 1102.

More common than physical assaults are instances where registrants are subjected to threats or harassment. In one case, after community notification was conducted, a local newspaper published a front page story about the registrant, L.M., under the headline, "PREDATOR AMONG US." L.M. then found that strangers were making threatening gestures towards him, and he was informed that there was a contract out on his life. He contacted the local prosecutor, who confirmed that his life was in danger. (PD 227-29.) Another registrant had a large rock thrown through the window next to where he was sleeping. The rock had a note attached, which read: "YOUR DEAD." (PD 232.) Many other instances where registrants have been threatened with death or bodily harm have been documented. (*See, e.g.*, PD 299 (neighbor tells reporter offender "should have been destroyed"); PD 109 (victim's friend threatened to "beat the crap out of [registrant]"); PD 102-03 (group of men threatened registrant, stating "we know where you live," and later beat him with broom handle and threw bottles at him); PD 126-27 (registrant received anonymous threatening letter); PD 135 (neighbor screamed obscenities at registrant's wife and said he intends to kill both of them); PD 268-72 (registrant received threatening letter after regular notification was disseminated and threatening phone calls after Internet notification was later conducted); PD 286-87 (people drove by registrant's home and yelled, "we're going

to get you"); PD 238-46 (anonymous callers threatened registrant and his wife, stating they would burn down registrant's home, or "we will cut your body up in little pieces").)

On other occasions, registrants have had human feces placed on the front steps of their home (PD 114), ground glass placed under the tires of their car (PD 143), their tires slashed and cars vandalized (PD 109, 117, 233, 295), raw eggs thrown at their car (PD 110), mail boxes destroyed (PD 286) and their homes broken into (PD 85). Harassing telephone calls are another common tactic. (PD 239 (callers scream "move the fuck out of here"); PD 238-46 (numerous harassing and threatening calls); PD 250 (same); PD 277 (numerous harassing telephone calls late at night).) Registrants also are frequently called various derogatory names when they go out in public. (PD 286 ("child-fucker"); PD 240 ("rotten son of a bitch"); PD 198 ("kid fucker").)

In many instances, registrants do not report these incidents because they believe, justifiably or not, that the police will have little interest in protecting them. (PD 127 (registrant subjected to threats indicates he "received no help from any law enforcement agency"); PD 102 (registrant did not report threats to police because he believed police were responsible for unauthorized disclosures of his status as registered sex offender); PD 217-18 (registrant was afraid of police because of way they had treated him in past).)

The level of fear and hatred of sex offenders runs so high that disclosure of a registrant's presence in the community may fulminate a witch hunt-type atmosphere in which town members band together to wage a coordinated campaign to persecute the offender and drive him out of town.

C.W. was convicted of sexual assault and murder in the mid-1970's. He was released from incarceration in 1989. After his release, he lived as a law-abiding citizen, obtained full employment, was able to purchase a home, and became an active church member. C.W. was the plaintiff (under the fictitious initials "E.B.") in one of the early suits challenging the constitutionality of the New Jersey statute. That court case generated considerable media attention. The initial media reports identified the town in which C.W. was living, but did not provide his name. However, the Guardian Angels – a citizen "safety patrol" group – went to C.W.'s town and handed out leaflets seeking information on C.W.'s whereabouts. (PD 61.) One Guardian Angel told a reporter, "we are going to be here every day until we find this rapist." (PD 64.) A few days later, a local political leader revealed C.W.'s identity on a New York radio talk show. (PD 53-54, 67.) The Guardian Angels then began handing out fliers which stated, "'E.B.,' we know who you are," and provided C.W.'s name and address. (PD 68.)[3] A crowd of reporters gathered in front of C.W.'s home that evening. (PD 54.) C.W. immediately began to receive threatening phone calls, as well as an anonymous letter that stated, "you need to die." (PD 69.) C.W. and his family were ostracized by the community and

[3] The uproar over C.W. was so intense that the federal district judge presiding over C.W.'s case and the attorney representing C.W. became targets as well. The same political figure who revealed C.W.'s name and address also disclosed on the Internet the home addresses of the judge and C.W.'s attorney. In addition, leaflets were distributed to the neighbors of the judge and the attorney, asking the neighbors to treat them as "social outcasts." (PD 70-73.)

lived in constant fear that they would be attacked. C.W. also lost his job. (PD 53-60.)

The events surrounding the release of registrant C.D. were similar. When the media learned that C.D. had moved in with his mother upon his release from prison, a group of at least twenty reporters descended upon the mother's home, stationing themselves in front of her building for over a week. The police had to be called to the scene to ease traffic congestion. C.D.'s family was afraid to leave the apartment, and when they did leave were harassed by the media. Reacting to the controversy, a local councilman made a public statement that he did not want individuals like C.D. living in the community. In addition, as with C.W., the Guardian Angels got involved. They distributed fliers and the leader of that group gave a press conference at a school across the street, stating that he was "going to hunt [C.D.] down, like one hunts an animal." (PD 35.) C.D. was so terrified by these events that he fled the country. (PD 31-46.) However, according to newspaper accounts, the Guardian Angels learned that C.D. had moved to Puerto Rico, followed him there, and distributed warning fliers in the area of his San Juan address. (PD 25b.)

In another case, a registrant identified as "Affiant 17" was living in a boarding home located for him by the staff at the psychiatric hospital where he was previously committed. When town residents learned that he and two other sex offenders were living in the community, they formed a "watchdog group" focused on driving the offenders from the community. Echoing common misconceptions about sex offender recidivism, one resident said, "These guys -- if they strike one time – they will strike again." (PD 189.) The watchdog group distributed leaflets encouraging other residents to attend a town council meeting. At the meeting,

residents confronted the owner of the boarding home, demanding that the registrant be evicted. The owner apologized and agreed to force the registrant out. A number of newspaper articles were published concerning these events. (PD 183-90 ("Neighbors Working to Oust Sex Offenders"; "Sex Offenders Are Not Welcome Here").)

Registrant J.D. had a similar experience. J.D. was incarcerated in prison for six and one-half years for a sex offense, then transferred to a psychiatric hospital for treatment of his bi-polar disorder. He was released from the hospital after approximately five months; his discharge plan called for him to live with his wife and son. However, when it became apparent that notices would be distributed to his family's neighbors, J.D. decided to leave the home rather than subject his family to community notification. J.D. subsequently moved into an affluent community close to his place of employment. Community notification was conducted, setting off a quick and vocal reaction from the public. The local newspaper ran a number of articles about J.D., describing the widespread fear his presence was causing. (PD 156-59n.) A town meeting was held, where residents asked local officials what could be done to force J.D. to leave. (PD 152-59.) Throughout this period, J.D. was subjected to harassment and received a number of threatening phone calls. J.D. later moved out of town. (PD 154, 159m; *see also* PD 238-46 (registrant E.S. and his wife were subjected to repeated harassment and threats, including callers threatening to burn their house down if they did not leave, and were told that a group of neighbors retained an attorney and met with mayor to see if they could force E.S. to move out of town).)

In some instances, even a rumor that a sex offender is living in the community can set off this type of a reaction.

Registrant J.P. moved into a community and local police were notified of his presence. Although no notification was conducted, a rumor quickly spread that there was a sex offender living in town. The police came to J.P.'s home and informed him that they had received "hundreds of angry telephone calls" concerning him. (PD 84.) Local officials called a town meeting to address this issue and approximately 250 residents attended. The meeting was reported in the local newspaper. (PD 87-88 ("Sex-offender rumor draws 250 to forum").) Shortly after the meeting, J.P. found himself subject to a steady stream of harassment. Over the ensuing years, J.P.'s car was repeatedly vandalized and his home was broken into on a number of occasions. (PD 83-88.)

Given the strong public reaction that community notification can ignite, it should not be surprising that the New Jersey law has done tremendous damage to registrants' prospects for employment and housing. With respect to employment, even employers who are willing to hire former convicts may draw the line at sex offenders because the employers reasonably conclude that their business cannot afford to run the risk that the community will learn a sex offender is working there.

That is what occurred to registrant W.L. He was hired by an oil company and worked for the company for about two and a half years. When the State sought to classify W.L. as a tier three sex offender, W.L.'s employer wrote to the judge, stating that W.L. "has demonstrated outstanding performance. He has shown his ability to be an excellent worker and I find him to be a highly respected person in our company." (PD 129.) Nevertheless, tier three notification was ordered. After notification, W.L.'s supervisor received phone calls from customers threatening to

take their business elsewhere because of W.L. A few days later, the employer told W.L. that the company was letting him go because of the impact community notification was having on the business. (PD 123-33.)

The record developed in New Jersey contains many other examples of instances where community notification has interfered with registrants' attempts to secure and maintain steady employment. (PD 160-63b (numerous residents complained to employer within hours after notification was conducted, and registrant quit that afternoon rather than see employer's business hurt); PD 76 (registrant fired after tier three notice distributed); PD 280 (owner hired registrant knowing he had a criminal record, but fired him when he learned it was a sex offense, stating: "I am afraid that business might be hurt if people know that a sex offender works here. I can't take that chance."); PD 206-08 (potential employer indicated he would not hire registrant without an assurance there would be no community notification); PD 24 (registrant not hired because of publicity accompanying notification); PD 101 (registrant lost job after reporter contacted employer concerning registrant); PD 57 (registrant C.W. lost job of six years shortly after his identity was revealed on radio and in newspaper); PD 247-51 (registrant lost a number of jobs because of sex offense history, resulting in disabling depression).)

Like employers, landlords are sensitive to the economic harm they may sustain if their tenants or the public-at-large learns that they are providing housing to a sex offender. Consider the case of J.R. When J.R. was 13 years old, he committed a sex offense against a younger sibling. Although there was no history of J.R. preying upon the community-at-large, tier two notification was ordered.

J.R., who was 17 or 18 years old by this time, was living with an uncle. When the uncle's landlord learned that a sex offender was staying there, the landlord told the uncle that if J.R. did not leave they both would be evicted. Left with little choice, the uncle told J.R. he had to leave. J.R. was homeless for a while, moving from one friend or relative's home to another. J.R. also lost his job upon his employer being notified of J.R.'s juvenile offense. (PD 78-80.)

Registrant A.E. was rendered homeless and lived on the streets for five months as a result of community notification. He had made excellent progress at the treatment facility for convicted sex offenders. Following his release, he obtained housing and employment, receiving excellent reports from his employer, and was able to buy a car. After seven months of successful placement in the community, notification was conducted, resulting in the loss of his job and apartment. While he was homeless, A.E. was arrested for shoplifting. (PD 75-78; *see also* PD 165 (owner advised registrant he would have to leave if community notification required, because owner feared harassment from neighbors and police); PD 121 (landlord informed registrant he was evicted after community members complained of registrant's presence and vandalized landlord's car); PD 91 (landlord changed locks on registrant's apartment after receiving complaints from neighbors); PD 259-67 (employer who provided housing for registrant on horse farm evicted him because of effects of community notification, even though registrant was "an excellent worker"); PD 273-75 (registrant required to inform landlord of sex offense was evicted and had difficulty obtaining new housing); *cf.* PD 126 (landlord received anonymous phone calls and complaints from friends about

renting apartment to registrant); PD 305 (owner of home identified as registrant's residence threatened after notification distributed); DOC 185 (owners association passed regulation barring sex offenders).)

Faced with this sort of response from the community, some offenders opted to flee the state rather than subject themselves or their families to community notification. (PD 305 (offender moved to Puerto Rico); PD 297 ("Notification law drives ex-con to Pennsylvania"); PD 298 ("Feeling the heat, freed offender flees N.J." (offender moved to Texas)); PD 47 (offender who was subjected to public leafleting left New Jersey because of fear of harassment and vigilante tactics); PD 200 (registrant and his family moved out of New Jersey in attempt to escape harassment); *cf.* PD 289 (registrant left town after the chief of police told him: "If you move here and register I'll make your life a living hell.").)

In the case of A.A., he moved out-of-state with his wife and children to spare his family the trauma of community notification. (PD 171-75.) Nevertheless, the family members who stayed behind were subjected to harassment. On two occasions, people who identified themselves as members of a Megan's Law citizens group appeared at the front door of A.A.'s mother-in-law. The group members demanded to know where A.A. was living and attempted to enter the home to confirm that A.A. and his children were not staying with her. (PD 176-80.)

In short, community notification can have a severe impact on registrants and their families, and carries consequences that potentially permeate every aspect of their lives. *See E.B.*, 119 F.3d at 1107 ("Notification puts the registrant's livelihood, domestic tranquility, and personal

relationships with all around him in grave jeopardy. This jeopardy will not only extend to virtually every aspect of the registrant's everyday life, it will also last at least 15 years."); *Otte*, 259 F.3d at 987 (concluding that notification "subjects [the offenders] to community obloquy and scorn that damage them personally and professionally").[4] Left with little hope of ever leading a normal life, in a few instances, registrants have opted for what they likely viewed as the only remaining route of escape – suicide.

The mother of registrant J.K. provided a declaration in which she described the circumstances that led to her son taking his own life. His offense involved J.K. having consensual sexual relations with a 15-year-old girl when he was 21. Upon his release from jail, J.K. moved back into the family home in a small town in southern New Jersey. Shortly after J.K.'s return, the family began to receive threatening phone calls. When J.K.'s mom would answer the phone, the callers would say things like, "tell your son that his days are numbered." (PD 217.) Following these threats, J.K. was physically assaulted on a number of occasions. In one of these beatings, the men who attacked J.K. punched him in the face and kicked him, telling J.K. he had "better move out of state." (PD 218.) In

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[4] These sorts of problems are not unique to New Jersey. A Department of Justice study of the impact of Wisconsin's notification law summarized interviews with thirty offenders. Eighty-three percent of the offenders said that notification resulted in "exclusion from residence"; seventy-seven percent reported "threats/harassment"; sixty-seven percent reported "emotional harm to family members" and "ostracized by neighbors/acquaintances"; and fifty percent reported "loss of employment." U.S. Dep't of Justice, National Institute of Justice, "Sex Offender Community Notification: Assessing the Impact in Wisconsin," at 10 (Dec. 2000) (hereinafter "*Wisconsin Study*").

addition to these problems, J.K. was unable to find work, and his girlfriend of two years broke up with him, telling him that she felt she would never be able to live a normal life with him because he was a sex offender and subject to Megan's Law. (PD 217-20.)

Faced with all this, J.K. became severely depressed and began to talk of suicide. His mother convinced him to go see a psychiatrist, but that did not seem to help. In despair, J.K. told his mother, "I have no hope. . . . What is left for me? I will be subject to Megan's Law for the rest of my life." (PD 220.) Two days later, J.K. shot himself to death in the driveway of his sister's home. (PD 219-20.)

There have been other Megan's Law-related suicides of registrants in other states. In a small Maine town, the police distributed fliers notifying residents that a convicted sex offender, Thomas Varnum, had moved into their community. Two days later, Varnum killed himself with a shotgun. He left behind an audio tape in which he said that he "couldn't go on living in a world where there was no forgiveness." (PD 171, 175.) In California, a sex offender, Michael Patton, hung himself from a tree five days after notices were distributed. (PD 163.) In New York, an investigator went to Edward Wood's home to advise him of his obligation to register. Wood went into another room, ostensibly to look for identification, and killed himself with a shotgun. (PD 161.) Other suicides have been reported, including suicides by family members of sex offenders. (PD 164 (therapist refers to two patients who committed suicide after being targeted by Megan's Law); DOC 157 (referring to two suicides in Britain that may be linked to newspaper's campaign to identify sex offenders); DOC 178 (teenage girl in Texas shot herself to death after her father's photo appeared on Internet registry, embarrassing her at

school); *cf.* PD 293 (stress of community notification caused registrant to relapse into depression; registrant said he does not want to live, and locked himself in bathroom with razor blade, threatening to kill himself); PD 301 (Texas offender attempted suicide after judge ordered him to put sign in front of his residence: "DANGER REGISTERED SEX OFFENDER LIVES HERE").)

It is important to bear in mind that most of the harms described above occurred under a system of "limited" community notification, such as the pre-Internet law New Jersey system, in which notification was provided only to those "likely to encounter" the registrant. The world-wide Internet notification schemes more recently adopted by Alaska and New Jersey are likely to increase exponentially the harm caused by notification (including the risk that persons far away will use the mail system to harm registrants) – without any attending increase in public safety.[5]

C. The Available Evidence Suggests That Notification Laws Increase the Risk to the Public.

Clearly, providing notification to persons who are not likely to encounter a registrant does not foster public safety. Indeed, it has never been shown that providing notification even to those who are likely to encounter an

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[5] Internet notification need not be world-wide. Among the materials lodged by *amici* is a declaration from a computer technology expert who indicates that, through the use of a password and geolocator system, access to Internet registry information concerning a particular offender could easily be restricted to only those likely to encounter that offender. (DOC 1-7.)

offender reduces recidivism. Contrary to the assertions of petitioners and their supporting *amici*, the existing evidence indicates that notification laws have no significant effect in lowering recidivism. Rather, there is reason to believe that these laws actually increase the risk to the public.

In the time since the New Jersey statute was enacted, New Jersey's Department of Corrections has conducted a number of studies of the recidivism rates of released sex offenders. Those studies indicate that relatively few commit another sex offense.[6] These findings are consistent with

[6] The conclusions reached by these studies included the following:

Of the 115 inmates released in 1994 from the sex offender treatment facility ("Avenel") where offenders found to be "repetitive, compulsive" are incarcerated, 7 (6%) were re-convicted of a sex offense in the five year period following their release. (DOC 114.)

Of the 123 inmates released from Avenel in 1995, 8 (6.5%) were re-convicted of a sex offense in the five year period following their release. (DOC 108.)

Of the 79 inmates released from Avenel in 1990, only 3 (3.8%) were re-convicted of a sex offense in the ten year period following their release. (DOC 101.)

Of the 507 inmates released from Avenel during the years 1994 through 1997, 34 (6.7%) were re-arrested for a sex offense in the three year period following their release. This rate was not significantly higher than the re-arrest rate for sex offenders who served their sentences in general population, rather than at Avenel, and maxed out on their sentences. For that group of 226 offenders, 14 (6.2%) were re-arrested for a sex offense in the three year period following their release. (DOC 94.)

The recidivism rates for the sex offenders studied were "substantially lower" than the rates for all inmates released in 1991. (DOC 97.) For example, the study that looked at

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research conducted elsewhere, which indicates that, as a group, sex offenders have lower rates of recidivism than other types of offenders. (Brief of *Amicus Curiae* Massachusetts Committee For Public Counsel Services; *see also* U.S. Dep't of Justice, Center for Sex Offender Management, *Myths and Facts About Sex Offenders* (August 2000) (hereinafter "*Myths and Facts*") (listing as a "myth" statement that "[m]ost sex offenders reoffend"); DOC 15, 50, 72, 83.)[7]

sex offenders released between 1994 and 1997 concluded that these offenders were significantly less likely to be re-arrested (32% vs. 53%), and less than half as likely to be re-convicted (20% vs. 41%). (*Id.*) Note that these numbers are for re-arrests/re-convictions for any type of offense, not just sex offenses.

Considering that in 1999 New Jersey enacted a civil commitment law for sexually violent predators, N.J. Stat. Ann. 30:4-27.24, *et seq.*, and, therefore, the most dangerous sex offenders are now being civilly committed when they complete their sentences, presumably the recidivism rates would now be even lower.

[7] The discussion of recidivism contained in the *amicus* brief filed by the Solicitor General is disingenuous. That brief, for example, cites one study to support a "43% recidivism rate" for sex offenders (SG Br. at 4 n. 2) – without disclosing: (1) that this study looked only at offenders classified as a high risk to re-offend; (2) that this particular recidivism rate was for juveniles; or (3) most importantly, that this finding was based on a sample size of only 14 juvenile offenders. (DOC 128; *cf.* DOC 83 (referring to five studies of a total of over 700 juveniles that found recidivism rates between 2.5% and 10%).) The more germane finding of this study was that only 14% of the 125 high risk adult offenders studied were arrested for a new sex offense. (DOC 133.) The Solicitor General also cites two Bureau of Justice Statistics ("BOJS") studies to support the assertion that "convicted sex offenders have a dramatically higher recidivism rate for their crimes than any other type of violent felon." (SG Br. at 3-4.) The studies do not support that assertion. To the contrary, the 2002 study lists sex offenders as one of the offender categories having "the lowest rearrest rates" (for any type of new

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The common assumption that community notification reduces recidivism has never been established. A Washington State study found "little evidence that community notification prevented recidivism among adult sex offenders." (DOC 138; *see also* DOC 18, 53, 70.) A study from Iowa similarly found no significant difference in sex offense recidivism rates between sex offenders who were subject to that state's registration and community notification law and sex offenders who were not. Iowa Dep't of Human Rights, *The Iowa Sex Offender Registry and Recidivism* 19 (Dec. 2000) ("Sex-offense recidivism was low at 3.0 percent for the registry sample and 3.5 percent for the pre-registry sample"). Even law enforcement agencies are doubtful that community notification is worthwhile; a Department of Justice survey of law enforcement agencies in Wisconsin found that "only 41 percent believed it improved management and containment of sex offender behavior through greater visibility." *Wisconsin Study* at 6.[8]

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offense) and concluded that only 2.5% of released rapists were re-arrested for a new rape. BOJS, *Recidivism of Prisoners Released in 1994*, at 1 (June 2002). By contrast, 13.4% of released robbers were arrested for a new robbery and 22% of released assaulters were arrested for a new assault. (*Id.* at 9.) Similarly, the 1997 study cited by the Solicitor General noted that a follow-up of felony offenders placed on probation found that "rapists had a lower rate of re-arrest for a new felony and a lower rate of re-arrest for a violent felony than most categories of probationers with convictions for violence." BOJS, *Sex Offenses and Offenders*, at 25-26 (Feb. 1997). The findings the Solicitor General is distorting are those which merely state that a convicted rapist is more likely than someone previously convicted of some other crime (*e.g.*, bank robbery) to be arrested for rape. *But see Recidivism of Prisoners Released in 1994*, at 9-10 (noting that 78 rapists were rearrested for rape, while *1,639* non-rapists were rearrested for rape).

[8] Notification laws should not be expected to have a substantial impact on public safety because they focus on only a narrow slice of the

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In fact, there is a very real possibility that notification laws increase the risk that an offender will commit another crime. Stability and community support are important factors that serve to reduce the risk of reoffense. An isolated, unemployed and homeless sex offender clearly presents a greater risk than one who has the support of friends and family, is working full time, and has a place to live. (DOC 15-17, 49-50, 69.)[9] Further, the stress community notification causes offenders may trigger a new sex offense. *See* R. Karl Hanson & Andrew Harris, Solicitor General of Canada, *Dynamic Predictors of Sexual Recidivism*, 1998-1, at 2 ("recidivists showed increased anger and subjective distress just prior to re-offending"). Anecdotal examples of instances where community notification has purportedly prevented a new offense fail to take these considerations into account.

Many of the people who are perhaps most directly involved in attempting to reduce recidivism – the therapists

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overall problem of criminal sexual conduct. The particular type of sex offense these laws are designed to prevent – one committed by a prior sex offender whose history is not known to the victim or his/her parents – is relatively rare. Of the thousands of persons convicted of a sex offense each year, the vast majority do not have any prior sex offense conviction. *See Myths and Facts* ("[i]n 1994, it was estimated that 12% of imprisoned violent sex offenders had a prior conviction for rape or sexual assault"). Moreover, "[m]ost sexual assaults are committed by someone known to the victim or the victim's family." *Id.*; *see also Amicus* Br. of the State of Cal., *et al.* at 11 (approximately 46% of child molestations are committed by family members).

[9] *See also Wisconsin Study* at 10 (many offenders interviewed for study "drew from their own embittered experience with community notification to suggest that the tremendous pressure placed on sex offenders by the public and the media would drive many of them back to prison").

who treat sex offenders – believe that community notification is counterproductive. (DOC 14, 48, 67.) Treatment has been shown to help to reduce the risk that a sex offender will reoffend. (DOC 15, 50, 69.) Notification laws interfere with treatment both directly – the negative impact on the offender's prospects for employment leaves them less able to afford treatment – and indirectly – the belief that they will never be able to lead a normal life saps their motivation to pursue and complete therapy. (DOC 15-18, 53, 69; *see also* DOC 68 (therapist gives example of patient who was doing very well in therapy, but following community notification became suicidal and reoffended).)

Justice Brennan's observations in *Trop v. Dulles*, 356 U.S. 86, 111 (1958) (Brennan, J., concurring), regarding a somewhat similar form of punishment – expatriation – are apt:

> instead of guiding the offender back into the useful paths of society it excommunicates him and makes him, literally, an outcast. I can think of no more certain way in which to make a man in whom, perhaps, rest the seeds of serious antisocial behavior more likely to pursue further a career of unlawful activity than to place on him the stigma of the derelict, uncertain of many of his basic rights.

CONCLUSION

Based upon the foregoing, *amici curiae* respectfully request that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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